STATE OF MICHIGAN

IN THE SUPREME COURT

DANIEL KEMP,

Plaintiff-Appellant,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, a Michigan corporation,

Defendant-Appellee.

MSC Case No. 151719

COA Case No. 319796
Wayne County Circuit Court
Case No. 13-008264-NF

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DEFENDANT-APPELLEE'S CORRECTED SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATUTE INVOLVED

MCL 500.3106 states, in relevant part:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> * * *
>
> > (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> * * *
>
> (2) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws, or under a similar law of another state or under a similar federal law, are available to an employee who sustains the injury in the course of his or her employment while doing either of the following:
>
> > (a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.

INTRODUCTION

Plaintiff-Appellant Daniel Kemp seeks No-Fault benefits for an injury to his back and calf muscle, allegedly suffered while standing on his "tiptoes" to retrieve a briefcase, thermos bottle, and garment bag over a case of beer from the back seat of his parked truck. This is a remarkable claim under a statute whose purpose is "to provide victims *of motor vehicle accidents* assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) (emphasis added). Indeed, if this Court accepts Mr. Kemp's interpretation of the Act, then No-Fault policies must cover strained backs, sprained wrists, stubbed toes, and any other common maladies that result from unloading groceries, grabbing a purse or wallet off the seat, or even unbuckling an infant from a car seat. Such an interpretation of the Act would greatly expand coverage and inevitably result in higher auto premiums for all Michigan residents, contrary to any conceivable legislative intent.

Unsurprisingly, Mr. Kemp's claim has no support in the No-Fault Act's plain language, and his claim fails for three independent reasons. First, Mr. Kemp's conduct does not fit the statutory provision he invokes, MCL 500.3106. Section 3106 only provides coverage where a claimant is injured by cargo or freight being lifted onto or lowered from a parked vehicle. It does not apply to retrieving personal property out of a parked vehicle's back seat. Second, Mr. Kemp's injury did not occur while his truck was being used *"as a motor vehicle*." MCL 500.3105(1) (emphasis added). Any transportational function of Mr. Kemp's truck ended when he parked it and turned off its motor. Third, Mr. Kemp's alleged injury has only the most incidental and fortuitous relationship to his parked truck: proximity. This Court and the Court of Appeals have repeatedly made clear that if an injury could have occurred anywhere, but happened to occur near a vehicle, that linkage is insufficient to trigger No-Fault liability. For all three of these reasons, the Court should summarily affirm or deny the application for leave.

BACKGROUND

Mr. Kemp asserts a right to No-Fault benefits as a result of injuries he suffered attempting to retrieve a briefcase, thermos bottle, and garment bag from behind a case of beer in the back seat of his parked truck. (Appl 1.) Specifically, Mr. Kemp claims that he satisfies the preconditions for coverage under the No-Fault Act's "parked car" provision, MCL 500.3106(1)(b), because his injuries occurred in the "loading or unloading process."

The trial court granted Farm Bureau Insurance's motion for summary disposition on three grounds: (1) there was no causal relationship between Mr. Kemp's injury and the parked truck because Mr. Kemp's actions were merely incidental to the vehicle, (2) Mr. Kemp's injury was not related "to the use of a motor vehicle as a motor vehicle," and (3) Mr. Kemp's injury was not "a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process." (12/13/13 Trial Ct Tr 10, 27–28; 6; and 20, respectively.) The trial court issued its order of dismissal on December 18, 2013, and Mr. Kemp timely appealed.

The Court of Appeals affirmed in an unpublished, per curiam opinion issued May 5, 2015. Applying this Court's analytic framework from *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), the Court of Appeals noted that a claimant who seeks to recover PIP benefits for an injury that involves a parked car must show three things: "(1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*, and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." Slip Op 2–3, quoting *Putkamer*, 454 Mich at 635–636. The "nexus between the injury and the use of the vehicle as a motor vehicle," said the Court, must be "sufficiently close" to justify benefits. *Id.* at 3, quoting *Putkamer*, 454 Mich at 635.

The Court of Appeals held that removing personal items from a parked vehicle "cannot be said to result from some facet particular to the normal functioning of a motor vehicle." Slip Op 3, quoting *Shellenberger v Ins Co of North America*, 182 Mich App 601, 605; 452 NW2d 892 (1990). That is because the "need to make similar movements in order to reach for [personal effects] routinely occurs in offices, airports, homes, conference rooms, courtrooms, restaurants, and countless other settings where no-fault insurance does not attach." *Id.*, quoting *Shellenberger*, 182 Mich App at 605. "The fact that [a] plaintiff's movement in reaching for [his personal effects] occurred in the interior of a truck does not transform the incident into a motor vehicle accident for no-fault purposes. *Id.*, quoting *Shellenberger*, 182 Mich App at 605.

Mr. Kemp's injury "had nothing to do with 'the transportational function' of his parked truck." Slip Op 3, quoting *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998). In other words, "his injury plainly did not arise out of the use of a motor vehicle as a motor vehicle"; "any causal relationship between the injury and parked truck was 'incidental.'" *Id.*, quoting *Putkamer*, 454 Mich at 636. Accordingly, the Court of Appeals concluded that Mr. Kemp was ineligible to receive no-fault benefits under MCL 500.3106.

Judge Beckering dissented. She concluded that Mr. Kemp fell within the plain language of MCL 500.3106 because he was engaged in "unloading" personal effects from his vehicle. Slip Op Dissent 5. And because Mr. Kemp's injuries occurred "during and *because of* the activity covered in 3106(1)(b), causation was sufficiently similar to warrant coverage. *Id.* at 6. In so reasoning, Judge Beckering failed to take into account the context of MCL 500.3106(1)(b), which makes clear that No-Fault loading/unloading benefits attach only when a person is injured as a result of physical contact with cargo or freight that is "being lifted onto or lowered from the vehicle." The No-Fault Act does not cover injuries caused simply by unloading personal items from a parked vehicle.

SUPPLEMENTAL ARGUMENT

In *Putkamer v Transamerica Insurance Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), this Court set forth a three-part test for determining when a claimant is entitled to recover PIP benefits for an injury involving a parked vehicle:

> (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*, and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." [*Putkamer*, 454 Mich at 635–636.]

Mr. Kemp must prevail on each of these three elements to recover. Because he cannot demonstrate that he satisfies any of the three elements, the Court should summarily affirm the Court of Appeals and trial court or, alternatively, deny the application for leave to appeal.

I. Mr. Kemp's conduct does not fit the § 3106(1) exception for claimants who have come in contact with property being "lifted onto or lowered from" a parked vehicle."

Under *Putkamer* factor number one, Mr. Kemp must show that his conduct fits one of § 3106(1)'s three exceptions. He invokes exception two, which relates to a claimant's physical contact with "equipment permanently mounted on the vehicle, while the equipment was being operated or used," or "property being *lifted onto or lowered from the vehicle in the loading or unloading process*." MCL 500.3106(1)(b) (emphasis added). Both the trial court and the Court of Appeals majority rejected Mr. Kemp's contention that he fit this exception, and they were correct.

When read in its full context, § 3106(1)(b) refers only to cargo or freight that is being "lifted onto or lowered from the vehicle in the loading or unloading process," *not* removing personal items from a vehicle's interior or trunk. The exception begins by referencing a claimant's "physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used." MCL 500.3106(1)(b). So if a flatbed truck has a lift or

crane permanently mounted on it, and a person comes in contact with the lift or crane while it is being operated, that person falls within the exception. The rest of the sentence does not stand on its own but is connected to the equipment-being-operated language by a comma: ", or property being lifted onto or lowered from the vehicle in the loading or unloading process." In other words, a claimant is covered if hit by the crane or lift, and also covered if hit by the cargo or freight the crane or lift is loading or unloading.

This point is made crystal clear by § 3106(2)(a), which excludes No-Fault recovery under § 1(b) if the injured person is entitled to worker's compensation benefits as a result of the loading or unloading work. MCL 500.3106(2)(a). Sub-provision (2)(a) goes on to say that No-Fault recovery may still be had if the loading/unloading injury "arose from the use or operation of another vehicle," i.e., if a worker is unloading the flatbed truck and is then struck by another vehicle. But the sub-provision excludes those situations where the "another vehicle" is a motor vehicle "being loaded on, unloaded from, or secured to, *as cargo or freight*, a motor vehicle." MCL 500.3106(2)(a) (emphasis added). In other words, when a worker is injured while loading or unloading cargo or freight, No-Fault coverage never applies, even if the "cargo or freight" consists of another vehicle.

By focusing myopically on the phrase "loading or unloading" in MCL 500.3106(1)(b), Mr. Kemp takes those words out of context. It would be exceedingly strange to describe the movement of a briefcase in and out of the backseat of a truck as "lift[ing]" the briefcase "onto" or "lower[ing]" it "from" the vehicle. These phrases are naturally associated with cargo or freight being lifted onto or lowered from a vehicle, as the worker's-compensation exception in § 3106(2)(a) makes clear. Indeed, cargo or freight is the only "personal property" that would ever be loaded or unloaded "onto" or "from" a vehicle in connection with the operation of equipment "permanently mounted on the vehicle." MCL 500.3106(1)(b).

Reading the entirety of § 3106 in context is consistent with the common understanding of the No-Fault Act's purpose: "to provide victims *of motor vehicle accidents* assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney Gen*, 402 Mich 554, 578–579; 267 NW2d 72 (1978) (emphasis added). If No-Fault liability is extended as far as Mr. Kemp requests—to include even a herniated disc in the back as a result of lifting a suitcase from the trunk of a car (Kemp Suppl Br 6)—the scope of No-Fault liability will be expanded far past anything the Legislature reasonably intended and will commensurately increase auto-insurance premiums for every Michigan citizen. This Court should reject Mr. Kemp's invitation to ignore the context of § 3106 when read as a whole.

II. Mr. Kemp's injury did not arise out of the "transportational function" of his motor vehicle.

Even before one gets to the § 3106 analysis, a claimant must pass through the No-Fault's gateway provision, MCL 500.3105, which states that an insurer is only liable to pay benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle *as a motor vehicle*." MCL 500.3105(1) (emphasis added). The emphasized language acknowledges the reality that not all uses of a vehicle are uses "as a motor vehicle."

Shortly after the *Putkamer* decision, this Court clarified that use of a vehicle as a motor vehicle must be consistent with the vehicle's transportational function:

> As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle'" would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses . . . It seems then that when we are applying the statute, the phrase "as a motor vehicle" *invites us to determine if the vehicle is being used for transportational purposes*. [*McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 218–219 (1998) (emphasis added).]

The *McKenzie* Court went on to make this element of the three-part *Putkamer* test as clear as possible, holding that "the Legislature intended coverage of injuries resulting from the use of motor vehicles *when closely related to their transportational function* and *only when engaged in that function*." *McKenzie*, 458 Mich at 220 (emphasis added). Applying the transportational-function test, the *McKenzie* Court held that the insured in that case was not entitled to PIP benefits for injuries that occurred while using the vehicle as sleeping accommodations, because that particular use was "too far removed from the transportational function to constitute use of the camper/trailer 'as a motor vehicle' at the time of the injury." *Id*. at 226. In that case, as here, there was no connection between the alleged injury and the vehicle's transportational function.

A vehicle can be in one of two states at any given time: engaged in a "transportational function," or not. There comes a moment when the transportational function of a vehicle ends. In this case, Mr. Kemp had been driving his vehicle and parked it in his driveway. He turned off the ignition, took his keys, opened his door, and got out. At that point, the vehicle was not in "use" at all.

Mr. Kemp's argument is that because the injury occurred when he was setting down *items which had been transported* by his vehicle, the injury arose out of the transportational function of the vehicle. (Kemp Suppl Br 5.) But the fact that personal property is placed in a truck's back seat does not imbue that property with the aura of transportational use. Otherwise, Mr. Kemp would be entitled to PIP benefits whether he removed the personal property immediately, several hours later, or the next day. Indeed, Mr. Kemp's theory would be no different if he injured his back while setting his property down in the kitchen. The problem is that Kemp's movement of personal property—regardless of when or where taken from or moved—has nothing to do with the use of a motor vehicle "as a motor vehicle."

Even if it could be said that Mr. Kemp's truck's "transportational use" somehow continued after he parked, turned off, and completely exited the vehicle, Mr. Kemp would still have to show that his injury arose out of the use of the motor vehicle. And this Court has:

> previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. [*People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006)(emphasis added).]

Here, Mr. Kemp caused his own injury by standing on his "tiptoes" to reach over a case of beer and twisting to place his personal items on the driveway. The truck *qua* truck did not hurt him in any way; Mr. Kemp's own movements caused the injured. As a result, it is not possible to say that his injuries "arose out of" the truck's use as a motor vehicle.

III. Mr. Kemp's injury was, at best, incidental to his parked truck.

Finally, Mr. Kemp is required to prove causation, i.e., that his "injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." *Putkamer*, 454 Mich at 634. But the only connection between Mr. Kemp's truck and his injury is the paradigm of incidental, fortuitous, and but for. The connection is "incidental" and "fortuitous" because the actual cause of the injury—bending over to set something down— is an action that could just as easily have occurred in any other place in the world; there is nothing about the car having been nearby that made this injury any more or less likely. The connection is "but for" in the sense that, had these items not been located in the back seat of Mr. Kemp's truck, Mr. Kemp would not have attempted to bend over to set the items down on his driveway and the alleged injury would not have occurred. A number of appellate decisions illustrate this point in a variety of contexts.

For example, in *Shellenberger*, the plaintiff truck driver entered the cab of his truck and started the vehicle to go on a delivery. While sitting in the cab, he reached for a briefcase inside the truck and ruptured a disc in his back. The plaintiff in *Shellenberger* had a much stronger factual case than Mr. Kemp: he was occupying the vehicle, the vehicle was running, and the briefcase he was reaching for contained documents he needed to review to make his delivery. Still, the Court of Appeals held that the injury did not arise out of the use of the vehicle as a motor vehicle and that there was no sufficient causal connection between the injury and the vehicle:

> It was a mere fortuity that plaintiff's injury occurred as he was sitting in the truck. The particular setting of the truck suggests nothing specific to its operation or use as a motor vehicle that played a part in the injury. [182 Mich App at 604.]

The fact that the driver needed to reach for the briefcase to obtain work documents did not transform the driver's movement into one that was an operation or use of the vehicle itself:

> [I]t may have been necessary for plaintiff to carry the briefcase in the fulfillment of his job duties as a truck driver, but it does not follow that those duties were congruent with the operation or use of the truck as a motor vehicle. Similarly, moving the briefcase by reason of the configuration of the interior of the truck cannot be said to result from some facet particular to the normal functioning of a motor vehicle. [*Id*. at 604–605.]

The reasoning in *Shellenberger* applies equally to Mr. Kemp's claim here.:

> The need to make similar movements in order to reach for a briefcase routinely occurs in offices, airports, homes, conference rooms, courtrooms, restaurants, and countless other settings where no-fault insurance does not attach. The fact that plaintiff's movement in reaching for the briefcase occurred in the interior of the truck does not transform the incident into a motor vehicle accident for no-fault purposes. [*Id*. at 605.]

Likewise, the movements Mr. Kemp made to retrieve and set down his briefcase here could have been made anywhere—an office, airport, home, conference room, courtroom, or restaurant. The fact that he made these movements in close proximity to his parked truck does not demonstrate that the truck somehow *caused* his alleged injury. As another Court of Appeals

opinion succinctly posed the question: "Could the injury just as well have occurred elsewhere? If so, there is no recovery." *Denning v Farm Bureau Insurance Group*, 130 Mich App 777, 786; 344 NW2d 368 (1983), lv den 419 Mich 877 (1984). Because Mr. Kemp's alleged injury here could "just as well have occurred elsewhere . . . there is no recovery." *Id.* at 786.

Similarly, in *Thornton v Allstate Insurance Co*, 425 Mich 643; 391 NW2d 320 (1986), the claimant taxi driver was shot by a passenger in the course of a robbery. The *Thornton* Court, after noting that without a relationship between the injury "and the vehicular use of the vehicle . . . that is more than 'but for', incidental, or fortuitous, there can be no recovery of PIP benefits," *id*. at 659, held that there was no sufficient relationship:

> The connection in this case between the debilitating injuries suffered by Mr. Thornton and the use of the taxicab as a motor vehicle is no more than incidental, fortuitous, or "but for." *The motor vehicle was not the instrumentality of the injuries. The motor vehicle here was merely the situs of the armed robbery— the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle. The relation between the functional character of the motor vehicle and Mr. Thornton's injuries was not direct*—indeed, the relation is at most incidental.
>
> The plaintiff urges us to find that the taxicab was the "instrumentality of the injury" because the assailants used the nature of the operation of a taxicab business to gain access to the robbery victim. Plaintiff argues that the use of the taxicab as a motor vehicle was essential to the success of the robbery, and that Thornton's injuries are foreseeably identifiable with the normal use of a taxicab as a motor vehicle. We disagree with this formulation. [*Id*. at 659–660 (internal citations omitted, emphasis added).]

The gist of Mr. Kemp's argument is that taking personal belongings out of a vehicle is "foreseeably identifiable" with the normal use of a motor vehicle. But in *Thornton*, this Court rejected Mr. Kemp's notion that an injury need only be "foreseeably identifiable" in order to be compensable under the No-Fault Act. Rather, this Court considered specifically whether the vehicle was "the instrumentality of the injuries," and found that it was not, because the injury was of a type that "could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle." *Id*. at 660. This same analysis applies here: Mr. Kemp's truck was not the

"instrumentality of" his injury where "the injury could have occurred whether or not [Mr. Kemp] used a motor vehicle as a motor vehicle." *Id*. Whatever relation there was between Mr. Kemp's injury and his vehicle was incidental at best

Likewise, in *Morosini v Citizens Insurance Co of Am*erica, 461 Mich 303; 602 NW2d 828 (1999), the plaintiff driver was struck in the rear by another motorist at a very low speed. When plaintiff stopped his vehicle and exited to inspect for any damage and exchange information with the other driver, the other driver physically assaulted the plaintiff, causing the injuries that gave rise to his PIP claim. The plaintiff argued that his injuries arose out of the use of his vehicle because "his getting out his car—thus exposing himself to the risk of an assault—to determine whether there was an accident resulting in damage was in compliance with his statutory obligations." This Court rejected that argument, holding that the vehicle was not the instrumentality of the injuries sustained:

> [T]he assault may have been motivated by closely antecedent events that involved the use of a motor vehicle as a motor vehicle, but the assault itself was a separate occurrence. *The plaintiff was not injured in a traffic accident*—he was injured by another person's rash and excessive response to these events. The assault in this case was not "closely related to the transportational function of motor vehicles." [*Id*. at 310–311 (emphasis added).]

Mr. Morosini's argument is similar to Mr. Kemp's position here: that taking personal items out of a vehicle (like getting out of a vehicle following a minor accident, reaching for an item inside the vehicle, or being robbed) is foreseeably identifiable with the normal operation of a motor vehicle such that injuries flowing from that foreseeable activity can be said to arise out of the use of a motor vehicle. That argument essentially posits: a person who drives a vehicle can be expected to do various other activities that are peripherally related to driving, activities which could expose the person to some level of risk (removing personal items, getting out to check for damage following an accident, reaching for an item inside a vehicle, being assaulted). Because the use of a vehicle might give rise to the opportunity for such secondary risks to be

encountered, the argument goes, all injuries arising out of such risks should be compensable under the No-Fault Act. As in *Shellenberger*, *Thornton*, and *Morosini*, Mr. Kemp's position should be rejected. Accord, *e.g.*, *Shaw v Allstate Ins Co*, 141 Mich App 331; 367 NW2d 388 (1985) (no coverage where plaintiff assaulted while sitting in his vehicle in his driveway); *Ciaramitaro v State Farm Ins Co*, 107 Mich App 68; 308 NW2d 661 (1981) (no coverage where plaintiff's decedent was killed by an armed assailant while conducting his normal door-to-door produce business from his truck); *Detroit Automobile Inter-Ins Exchange v Higginbotham*, 95 Mich App 213; 290 NW2d 414 (1980) (no coverage where plaintiff forced to the curb by her estranged husband, trapped in her car, and then shot); *Hamka v Automobile Club of Michigan,* 89 Mich App 644; 280 NW2d 512 (1979) (no coverage where plaintiff punched in the nose by a pedestrian while plaintiff was sitting in his car at an intersection); *O'Key v State Farm Mut Auto Ins Co*, 89 Mich App 526; 280 NW2d 583 (1979) (no coverage where plaintiff shot while trying to evade an assailant entering the passenger side of his car).

Various other situations arise where the subject injury was not caused by an incident that anyone would call a car accident. In *Block v Citizens Insurance Co of America*, 111 Mich App 106; 314 NW2d 536 (1981), the plaintiff slipped and fell on ice a few feet away from her van while she was approaching to enter, causing her to slide underneath her van; the Court held that the accident had no causal connection to the claimant's use of the van. As in this case, the vehicle did not cause her to fall, the only connection to the accident was incidental or but for; if she had not been walking near her van to prepare to get in, the accident would not have occurred.

In *Krause v Citizens Ins Co of America*, 156 Mich App 438; 402 NW2d 37 (1986), the plaintiff had met up in an area with a number of other hunters, when a rifle that had been set on top of a vehicle in the course of the vehicle being loaded discharged when the vehicle was bumped; the plaintiff was injured. Although, similarly to the case at bar, the plaintiff argued

that "the injury occurred during the loading process of a parked vehicle," the Court held "it is obvious to us that the vehicle's involvement in the injury was incidental and the injury was not directly related to the vehicle's character as a motor vehicle."

In *Williams v Pioneer State Mutual Insurance Co*, 857 NW2d 1 (Mich, 2014), the plaintiff was getting into her car when a tree branch fell from above, hitting her on the head. This Court held that the Court of Appeals clearly erred by holding that defendant was not entitled to judgment as a matter of law under this third *Putkamer* element:

> [T]here is no evidence in this case that plaintiff's act of opening her car door caused the tree branch to fall—it would have fallen whether plaintiff was entering her car or not. Therefore, as the dissenting judge below stated, "If there is any causal relationship between plaintiff's injury and the parked car, the relationship is surely incidental. An incidental or unfortunate causal relationship does not create a question of fact within the Putkamer requirements . . . . Without evidence of a sufficient causal connection between plaintiff's injury and her use of the parked motor vehicle as a motor vehicle, defendant is entitled to judgment as a matter of law. [*Id.*]

Again, the plaintiff's use of the vehicle did nothing more than create the opportunity for the injury to have occurred; because the vehicle was not the *instrumentality of the injury*, there was no sufficient causal connection that could form the basis for coverage under the No-Fault Act.

In sum, for No-Fault coverage to be activated, the motor vehicle *must be the instrumentality of the injury*. "Could the injury just as well have occurred elsewhere? If so, there is no recovery." *Denning*, 130 Mich at 786. Mr. Kemp's alleged injuries could have occurred anywhere. They happened to occur adjacent to his car. That does not make him eligible for No-Fault benefits.

CONCLUSION AND RELIEF REQUESTED

The decision of the Court of Appeals was not clearly erroneous nor does it conflict with any decisions of this Court or the Court of Appeals. In addition, the decision comports with common sense: the Legislature never intended the No-Fault Act to cover a person who injures his or her back removing groceries or personal effects from a vehicle.

Accordingly, Farm Bureau Insurance respectfully requests that this Court summarily affirm the Court of Appeals or deny the application for leave to appeal.

Dated: March 18, 2016

KOPKA PINKUS DOLIN PLC

By: /s/Donald A. Winningham

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